
OPINION OF THE PUBLIC ACCESS COUNSELOR

KENDRA J. OWEN,
Complainant,

v.

EVANSVILLE | VANDERBURGH CNTY. JOINT CENT.
DISPATCH
Respondent.

Formal Complaint No.
18-FC-71

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to the formal complaint alleging that the Evansville/Vanderburgh County Joint Central Dispatch (“Central Dispatch”) violated the Access to Public Records Act¹ (“APRA”). Central Dispatch did not file an answer to the complaint with this Office. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion

¹ Ind. Code §§ 5-14-3-1 to -10

to the formal complaint received by the Office of the Public Access Counselor on May 7, 2018.

BACKGROUND

Kendra J. Owen (“Complainant”) contends that the Evansville/Vanderburgh County Joint Central Dispatch (“Central Dispatch”) violated the Access to Public Records Act by failing to respond to her public records request. Owen also claims Central Dispatch is violating APRA by and through the public records request form the agency uses because the form “demands a reason for request” and requires a requestor to certify that the requested records will be used for the “sole and express purpose” the requestor identifies on the request form.

Moreover, Owen challenges the agency’s stated policy of charging a fee of \$50.00 per hour—with a minimum charge of \$25.00— for producing copies of audio recordings. In addition to the fee provision itself, Owen argues that Central Dispatch’s stated policy of waiving the fee for local media and government agencies violates APRA because it is not uniform to all purchasers.

On April 12, 2018, Owen filed a “request for public information” form with Central Dispatch seeking the following:

All written procedures, policies, advisories, or other instructive writings relating to public records requests.

Legal basis upon which your agency proposes to charge an hourly rate for copies of recordings (Note: this cannot be for the price of a CD as you additionally require provision of that CD).

Legal basis upon which your agency proposes to demand a reason for the records request.

Legal basis upon which your agency proposes to require a requestor to certify that the reason given for requesting the records (which are forbidden by law to ask for to begin with) is the sole and express purpose(s) of the information will be used.

Owen claims she received no response at all from Central Dispatch concerning the request. As a result, she filed a formal complaint with this Office on May 7, 2018 alleging an APRA violation for the lack of response. Owen contemporaneously filed a second a formal complaint challenging the provisions and policies set forth on the request form. This Office consolidated the complaints into a single case.

On May 9, 2018, this Office notified Central Dispatch of the complaint and solicited a response from the agency. Six days later, Central Dispatch Deputy Director Leslie Buckman sent an email to this Office admitting that the agency received Owen's request but believed it to be a bad joke.

On May 17, 2018, after this Office explained to Deputy Director Buckman that the issues raised by Owen, if true, indeed are valid, Buckman acknowledged that Central Dispatch's request form is "ages old" and she would endeavor to update the form.

Since then, there has been nothing further from Central Dispatch on this matter. This Office has received no response from Central Dispatch concerning Owen's formal complaint.

ANALYSIS

This case presents two primary issues: (1) Did the Evansville/Vanderburgh County Central Dispatch violate the Access to Public Records Act by failing to respond to Owen’s public records request; and (2) Did the agency violate APRA through the purpose and fee provisions stated in the agency’s request form

1. Cooperation from Public Agencies

As a preliminary matter, this opinion will address Central Dispatch’s failure to submit an answer to this Office after receiving notice of the formal complaint against it. Indiana Code section 5-14-5-5 expressly states that a “public agency *shall* cooperate with the [Public Access] Counselor in any investigation or proceeding under this chapter” (emphasis added). Indeed, the chapter referenced in that statute is the one that governs the formal complaint procedure administered by this office. Stated differently, public agencies must work with this Office in any formal complaint investigation or proceeding.

Here, the agency failed to provide a response to the allegations raised by Owen in the complaint despite receiving notice and an invitation to do so by this Office. Plainly enough, doing nothing falls short of cooperation.

Central Dispatch should be mindful going forward that a cooperating with this Office necessarily requires—at minimum—a response to the allegations contained in a formal complaint. Otherwise, this Office will presume that the agency does not dispute the Complainant’s allegations. This Office will not form and present arguments on behalf of an

agency that does not file an answer to a complaint. After all, it makes sense to respond to a formal complaint because failing to respond to an allegation that the agency fails to respond is one of the most efficient methods of strengthening the Complainant's argument.

2. The Access to Public Records Act (“APRA”)

The Access to Public Records Act (“APRA”) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. The Evansville/Vanderburgh County Joint Central Dispatch is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy Central Dispatch's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Granted, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

2.1 Agency Failure to Respond; Denial

Owen claims that Central Dispatch did not respond to her records request at all; and thus, the failure to respond constitutes an APRA violation.

Under APRA, if a written request has been made to the agency and there is no response for more than seven days, the request is deemed denied. *See* Ind. Code § 5-14-3-9(b).

Here, based on the evidence submitted, Owen submitted her written request to Central Dispatch via email on April 12, 2018. At the time of filing her complaint on May 7, 2018, Owen stated that she had received “no response at all.” Even though Central Dispatch did not file a response to the complaint, its Deputy Director acknowledged receiving the request during an email exchange with this Office.

Based on the information provided and without the benefit of a response from the agency it is the opinion of this Office that Central Dispatch failed to respond with seven days to Owen’s request. The failure to respond constitutes a denial under APRA.

Central Dispatch should note well that once a denial occurs, a person may file legal action in the circuit or superior court of the county in which the denial occurred to compel the agency to disclose the requested records. Ind. Code § 5-14-3-9(e).

2.2 Reason and Fee Provisions in the Request Form

Owen argues that the certain provisions of the public records request form used by Central Dispatch violates APRA. Specifically, she challenges the section of the request form

that she claims “demands a reason for the request” and the related clause that states the requestor, by signing the form, certifies that information request will be “utilized...for the sole and express purpose(s)” outlined in the request.

Owen also disputes the fee provision included in Central Dispatch’s request form, which states that copies of recordings “will be charged at a rate of \$50.00 per hour, minimum charge \$25.00.” The agency waives this fee for the media and government agencies, which Owen argues is also a violation of APRA’s requirement that fees be “uniform to all purchasers.”

2.21 Reason for the Request

APRA expressly states that “no request *may be denied* because the person making the request refuses to state the purpose of the request, unless such condition is a required by [another] applicable statute.” Ind. Code § 5-14-3-3(a)(2) (emphasis added).

Here, the agency’s request form includes an information field titled: “Reason for Request.” The form also declares that by signing the form the requestor certifies that the requested information will be utilized for the “sole and express purpose(s)” outlined in the request form.

Although providing a requestor with the opportunity to state the reason for a request on the request form—in itself—is not contrary to APRA, this Office has consistently cautioned against the practice of public agencies inquiring into the reason or purpose of a public records request.

Plainly enough, it avoids even the *perception* that a requestor's stated purpose is the reason for a subsequent denial of the request.

What is important here is whether Central Dispatch denies requests if the requestor does not state a reason for the request and does not certify that purpose by signing the form. If yes, that practice would be at odds with the command of APRA.

Regardless, Owen does not argue Central Dispatch denied her request for refusing to state the purpose of the request. Instead, her complaint is that the form provides a space for a requestor to state the reason. That does not, without more, constitute an APRA violation. The agency would need to *deny the request* because the requestor refused to provide a reason.

Even so, the request form ought to be amended to avoid even the perception that fulfillment of a records request is conditioned on requestor providing and certifying a reason or purpose for the request.

2.22 Fee Provisions and Practices

Owen argues that Central Dispatch's policy of charging a fee of \$50.00 per hour— with a minimum charge of \$25.00— for providing copies of audio recordings is at odds with APRA.

Although APRA prohibits a public agency from charging any fee to inspect a public record or to search for, examine, or review a record to determine whether the record may be

disclosed,² an agency may charge a fee—uniform to all purchasers—for copying, or costs for providing electronic records. In the context of a providing a duplicate copy of an audio recording, the fee must not exceed the “agency’s *direct cost* of supplying the information in that form.” Ind. Code § 5-14-3-8(g)(1) (emphasis added).

APRA defines *direct cost* as one hundred five percent (105%) of the sum of the cost of:

- (1) the initial development of a program, if any;
- (2) the labor required to retrieve electronically stored data; and
- (3) any medium used for electronic output
for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8(g) of this chapter

Ind. Code § 5-14-3-2(d). This is certainly a fact-based, case-by-case determination. If providing a duplicate of an audio recording necessitates a laborious process, as opposed to a drag-and-drop of a file, then *perhaps* the stated rate is appropriate but only if it complies with the statute. For routine files, however, this is surely not the case. A duplication fee under the APRA must not be used as a revenue stream nor a deterrent to public access; rather it is a mechanism for recouping costs.

In addition to the existence of the fee itself, Owen claims Central Dispatch’s policy of waiving the fee for the media or another government agency does not comport with APRA.

² Ind. Code § 5-14-3-8(b).

APRA expressly states that fees must be *uniform to all purchasers*. See Ind. Code § 5-14-3-8. All seekers of electronic data are to be charged consistently and uniformly regardless of their status; all the more reason to charge an efficient minimal fee.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Evansville/Vanderburgh County Joint Central Dispatch violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor